

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOAQUIN BASURTO-ESPINO,

Defendant.

NO. CR-09-2046-EFS

**ORDER DENYING DEFENDANT'S
MOTION TO MODIFY SENTENCE
PURSUANT TO 3582(c)(B)(2)**

Before the Court, without oral argument, is Defendant Joaquin Basurto-Espino's Motion to Modify Sentence Pursuant to 3582(c)(B)(2) (ECF No. [59](#)), filed November 22, 2010. Mr. Basurto-Espino asks the Court to modify his sentence consistent with 1) a four-level downward departure under U.S. Sentencing Guidelines § 5K3.1, and 2) a one-year sentence reduction under section 5K2.0 because he is ineligible for certain services due to his alien status. The U.S. Attorneys' Office ("USAO") opposes the motion. After reviewing the motion, the USAO's response, and applicable statutory and case law, the Court is fully informed and denies the motion.

Mr. Basurto-Espino seeks modification of his sentence under 28 U.S.C. § 3582(c)(B)(2). This particular subsection does not exist.

1 Section 3582 does exist in Title 18, which specifically covers the
2 modification of a sentence. Section 3582(c) provides, in pertinent part:
3 "The court may not modify a term of imprisonment once it has been imposed
4 except that" modification is permitted under certain circumstances 1)
5 upon motion of the Director of the Bureau of Prisons, *id.* §
6 3582(c)(1)(A); 2) when specifically permitted by Federal Rule of Criminal
7 Procedure 35 or other statute, *id.* § 3582(c)(1)(B); and 3) when an
8 amendment to the applicable U.S. Sentencing Guidelines has been adopted
9 which results in a lower guideline range, *id.* § 3582(c)(2).

10 Because the current motion has not been filed by the Director of the
11 Bureau of Prisons, relief is not available under subsection (1)(A). And
12 Mr. Basurto-Espino's motion is not based upon any amendment to the U.S.
13 Sentencing Guidelines; thus, he is not entitled to relief under
14 subsection (2). Mr. Basurto-Espino was sentenced on January 13, 2010;
15 accordingly, his November 30, 2010 motion is untimely for Rule 35
16 purposes. See Fed. R. Crim. P. 35(a) (allowing a judgment to be
17 corrected within seven days of sentencing for an arithmetical, technical,
18 or other clear error).

19 Yet, Mr. Basurto-Espino's motion may be construed as a habeas
20 petition under 28 U.S.C. § 2255 to vacate, set aside, or correct his
21 sentence. But the Court will not construe Mr. Basurto-Espino's motion
22 as a § 2255 habeas petition unless directly informed by Mr. Basurto-
23 Espino to do so, because a prisoner is given *only one* opportunity to file
24 a habeas petition, absent the requirements for a second or successive
25 motion being met as set out in the statute. Therefore, a habeas
26 petitioner must include all of the grounds for relief in the initial

1 habeas petition, or risk being barred from asserting such in the future.
2 *See Bleuford v. Prunty*, 108 F.3d 251, 255 (9th Cir. 1997); *Trimble v.*
3 *City of Santa Rosa*, 49 F.3d 583, 586 (9th Cir. 1995). Mr. Basurto-Espino
4 is advised that he must file his habeas petition within § 2255's one-year
5 statute of limitations. *See* 28 U.S.C. § 2255(f).

6 Accordingly, **IT IS HEREBY ORDERED:** Defendant Joaquin Basurto-
7 Espino's Motion to Modify Sentence Pursuant to 3582(c)(B)(2) (**ECF No. 59**)
8 is **DENIED**.

9 **IT IS SO ORDERED.** The District Court Executive is directed to enter
10 this Order and provide a copy to Defendant and the USAO.

11 **DATED** this 28th day of December 2010.

12
13 s/Edward F. Shea
14 EDWARD F. SHEA
United States District Judge

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